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4 ROBERT ABEYTA,
5 Plaintiff,
6 v.
7 DMCG, INC.,
8 Defendant.

9 Case No. 22-cv-07089-SI
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**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS FOR
IMPROPER VENUE**

12 Re: Dkt. No. 13
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17 On March 10, 2023, the Court held a hearing on defendant DMCG, Inc.'s motion to dismiss
18 plaintiff's complaint pursuant to Rule 12(b)(3), or in the alternative, to transfer venue under 28
19 U.S.C. § 1404(a). For the reasons set forth below, the Court DENIES DMCG's motion to dismiss
20 for improper venue and alternative motion for discretionary transfer of venue.
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BACKGROUND

23 On October 3, 2022, plaintiff Robert Abeyta, a resident of Oakland, filed this class action
24 lawsuit against defendant DMCG in Alameda County Superior Court. DMCG removed the case to
25 this Court on November 11, 2022. DMCG is a California corporation that operates as a bond agent
26 "throughout the State" and has its headquarters in Riverside, California. Compl. ¶ 2. Abeyta claims
27 that DMCG, doing business as "Bail Hotline Bail Bonds," did not provide him with written
disclosures required under California consumer protection laws when he signed documents to obtain
a loan for a non-refundable bail bond premium in order to bail a friend out of jail. Abeyta seeks to
represent a class of "[a]ll people who cosigned a bail bond credit agreement from DMCG . . . which
did not include the notice described in California Civil Code Section 1799.91¹ prior to signing, and

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1 who (1) owed, were asked to make, or made a payment on or after October 3, 2018, to DMCG . . .
2 and (2) were not a spouse of the person who received release services under the arrangement at the
3 time of cosigning.” *Id.* ¶ 28.

4 In order to bail his friend out of jail, Abeyta signed three documents – a “Surety Bail Bond
5 Agreement,” a “Promissory Note,” and a “Plain Talk Contract” – and he claims that those “credit
6 agreements” were part of the same transaction and collectively created a contract. *Id.* ¶ 12. As part
7 of these credit agreements, Abeyta co-signed a “consumer credit contract” financing a bail bond
8 premium of \$15,500. *Id.* ¶ 15. Abeyta paid a \$4,500 “down payment” and one installment payment
9 of \$300. *Id.* ¶¶ 15, 21. Abeyta alleges that DMCG did not provide the written notice required under
10 California Civil Code § 1799.91, and that “[i]nstead, Bail Hotline put Mr. Abeyta under the
11 impression that his signature was merely needed to process his friend’s release from jail, not that
12 doing so would create an ongoing set of financial obligations and liabilities for him.” *Id.* ¶ 16.
13 Abeyta claims he would not have agreed to co-sign or make any payments if DMCG had provided
14 the notice required by Section § 1799.91. *Id.* ¶ 19. Abeyta also claims that DMCG attempted to
15 collect on the remaining balance of the premium by calling him and mailing him letters despite
16 California Civil Code § 1799.95 rendering these collection attempts unlawful.

17
18 _____
19 one person on a consumer credit contract, and the signatories are not married, the creditor must
20 provide the cosigner with a specified cosigner notice.” *BBBB Bonding Corp. v. Caldwell*, 73 Cal.
21 App. 5th 349, 361 (2021). Section 1799.91 requires the following notice:

22 NOTICE TO COSIGNER

23 You are being asked to guarantee this debt. Think carefully before you do. If the
24 borrower doesn’t pay the debt, you will have to. Be sure you can afford to pay if you
have to, and that you want to accept this responsibility.

25 You may have to pay up to the full amount of the debt if the borrower does not pay.
26 You may also have to pay late fees or collection costs, which increase this amount.

27 The creditor can collect this debt from you without first trying to collect from the
28 borrower. The creditor can use the same collection methods against you that can be
used against the borrower, such as suing you, garnishing your wages, etc. If this debt
is ever in default, that fact may become a part of your credit record.

This notice is not the contract that makes you liable for the debt.

Cal. Civ. Code § 1799.91.

The complaint asserts causes of action under California’s Unfair Competition Law (“UCL”) and the Rosenthal Fair Debt Collection Practices Act. Abeyta seeks monetary restitution, statutory damages, injunctive and declaratory relief, and all other appropriate relief from DMCG’s unenforceable and unlawful credit bail agreements.

On December 23, 2022, DMCG filed a motion to dismiss under Rule 12(b)(3) and 28 U.S.C. § 1406(a) for improper venue, or in the alternative to transfer venue under 28 U.S.C. § 1404(a). DMCG invokes a venue selection clause contained in the Promissory Note signed by Abeyta, which provides that “Any litigation arising out of this bail bond(s) shall take place in Riverside, California.” McGuire Decl., Ex. A (Dkt. No. 13-2).

LEGAL STANDARD

The general venue statute states that “[a] civil action may be brought in – (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court’s personal jurisdiction with respect to such action.” 28 U.S.C. § 1331(b).

A defendant may move to dismiss a case for improper venue under Rule 12(b)(3) and 28 U.S.C. § 1406. If the initial venue is improper, the district court “shall dismiss, or if it be in the interest of justice, transfer the case to any district or division in which it could have been brought.” 28 U.S.C. § 1406(a); *In re Hall, Bayoutree Assocs., Ltd.*, 929 F.2d 802, 804 (9th Cir. 1991). The interest of justice ordinarily requires transferring the case to the proper venue rather than dismissing the case. *Baeta v. Sonchik*, 273 F.3d 1261, 1264-65 (9th Cir. 2001).

If the Court finds that initial venue is proper, “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil matter to any other district or division where it might have been brought.” 28 U.S.C. § 1404(a). Section 1404(a) seeks to “prevent the waste of time, energy, and money and to protect litigants, witnesses, and the public against

1 unnecessary inconvenience and expense.” *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964)
2 (internal citations and quotations omitted).

4 DISCUSSION

5 I. Venue Selection Clause

6 DMCG moves to dismiss under Rule 12(b)(3) and 28 U.S.C. § 1406(a) on the ground that
7 venue is improper in the Northern District of California because of the Promissory Note’s clause
8 designating Riverside, California as the venue for litigation.² However, “a forum-selection clause
9 may be enforced by a motion to transfer under § 1404(a),” not “a motion to dismiss under [§ 1406(a)]
10 or Rule 12(b)(3).” *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. Of Tex.*, 571 U.S. 49, 52
11 (2013). In addition, dismissal under Section 1406(a) is not warranted as “venue is proper here
12 because the case was filed in a state court within this district and then removed to federal court.”
13 *Stability Sols., LLC v. Medacta USA, Inc.*, No. 22-CV-07412-LB, 2023 WL 350546, at *3 (N.D.
14 Cal. Jan. 20, 2023) (citing 28 U.S.C. § 1441(a) and *Skillnet Sols., Inc. v. Ent. Publ’n, LLC*, No. C
15 11-4865 PSG, 2012 WL 692412, at *4 (N.D. Cal. Mar. 2, 2012)).

16 DMCG moves in the alternative to enforce the Promissory Note’s venue provision and
17 transfer venue to the Central District of California. DMCG cites *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509 (9th Cir. 1988), for the proposition that “the federal rule announced in *The
18 Bremen* controls enforcement of forum clauses in diversity cases” and under that rule, “[f]orum
19 selection clauses are *prima facie* valid, and are enforceable absent a strong showing by the party
20 opposing the clause ‘that enforcement would be unreasonable or unjust, or that the clause [is] invalid
21 for such reasons as fraud or overreaching.’” *Id.* at 513, 514 (quoting *The Bremen v. Zapata Off-
22 Shore Co.*, 407 U.S. 1, 15 (1972)).

24 Abeyta argues that the venue clause is invalid because it is contrary to California law and
25 public policy governing venue for specific types of consumer litigation as set forth in California
26

27 _____
28 ² The clause at issue is a venue selection clause rather than a forum selection clause.
However, most of the case law addresses forum selection clauses, and thus this order uses both
terms.

1 Code of Civil Procedure § 395(b)-(c). Section 395(b) provides “in an action arising from an offer
2 or provision of goods, services, loans or extensions of credit intended primarily for personal, family
3 or household use, . . . the superior court in the county where the buyer or lessee in fact signed the
4 contract, where the buyer or lessee resided at the time the contract was entered into, or where the
5 buyer or lessee resides at the commencement of the action is the proper court for the trial of that
6 action.” Cal. Civ. Proc. Code § 395(b). Section 395(c) provides that “[a]ny provision of an
7 obligation described in subdivision (b) waiving that subdivision is void and unenforceable.” *Id.*
8 § 395(c). Abeyta argues that under Section 395(b), Alameda County was the only permissible
9 venue because that is where he signed the Promissory Note, resided when he signed it, and resided
10 when filed the complaint, and that the venue clause providing for Riverside is void and
11 unenforceable under Section 395(c).

12 Abeyta argues that while federal law governs the enforcement of forum selection clauses in
13 diversity cases, state law determines the threshold question of whether the forum selection clause is
14 valid. Abeyta relies on *DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.*, 28 F.4th 956 (9th
15 Cir. 2022), in which the Ninth Circuit affirmed a district court’s denial of a motion to transfer venue
16 after finding a forum selection clause invalid under California Labor Code § 925. That statute
17 prohibits employers from requiring California employees to litigate disputes outside of California
18 and permits parties who were unrepresented by counsel when they signed agreements containing
19 forum selection clauses designating non-California forums to void such clauses. In *DePuy*, the
20 California plaintiff had exercised his right under section 925 to void a forum selection clause
21 specifying a New Jersey forum. The Ninth Circuit held that under those circumstances, while
22 federal law governed the enforcement of forum selection clauses, the validity of the forum selection
23 clause would be determined by state law. *Id.* at 963-64. The court expressly stated “[w]e need not
24 decide whether state law would govern the validity of a forum-selection clause that had not been
25 voided and is before the district court for consideration in the transfer analysis.” *Id.* at 964 n.6.

26 Abeyta also argues that even if the validity of the venue clause was assessed under federal
27 law, the outcome is the same because under federal law, “a contractual forum selection clause is
28 ‘unenforceable if enforcement would contravene a strong public policy of the forum in which suit

1 is brought.”” *Gemini Techs., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 914 (9th Cir. 2019)
2 (quoting *The Bremen*, 407 U.S. at 15); *see also Sun v. Advanced China Healthcare, Inc.*, 901 F.3d
3 1081, 1088-90 (9th Cir. 2018) (plaintiff has the burden to make a “strong showing” that a state
4 statute or judicial decision “clearly states. . . a strong public policy.”); *Rowen v. Soundview*
5 *Comm’ns, Inc.*, No. 14-CV-05530-WHO, 2015 WL 899294, at *4 (N.D. Cal. Mar. 2, 2015)
6 (collecting cases and concluding, “absent a total foreclosure of remedy in the transferee forum,
7 courts tether their policy analysis to the forum selection clause itself, finding the forum selection
8 clause unreasonable only when it contravenes a policy specifically related to venue.”). Abeyta
9 argues that Section 395(c) expresses a strong public policy of the State of California against coercing
10 consumers to litigate consumer claims in inconvenient venues.

11 The Court agrees with Abeyta that the venue clause is unenforceable under federal law, and
12 thus need not decide whether state law governs the validity of the venue selection clause. The venue
13 clause “contravenes a policy specifically related to venue” as set forth in Section 395(b)-(c).
14 Section 395(b) reflects the strong public policy of California “to permit venue in the county of the
15 residence of the injured consumer-plaintiff,” and Section 395(c) provides that venue provisions that
16 violate section 395(b) are “void and unenforceable.” *See Fontaine v. Sup. Ct.*, 175 Cal. App. 4th
17 830, 839 (2009) (issuing writ of mandate directing trial court to vacate transfer order that violated
18 Section 395(b) and noting that “as intended by the Legislature, section 395, subdivision (b) provides
19 a statutory exception to the general venue rule, by authorizing venue in the county where a consumer
20 plaintiff resides at the commencement of his or her action arising from a consumer transaction as
21 specified in the statute”). California courts have recognized that Section 395 “declare[s] the public
22 policy of this state with respect to the proper court for an action,” and have held that “agreements
23 fixing venue in some location other than that allowed by statute are a violation of that policy.”
24 *Alexander v. Sup. Ct.*, 114 Cal. App. 4th 723, 731 (2003); *see also Jones*, 211 F.3d at 498 (holding
25 forum selection clause was unenforceable based on California statute “voiding any clause in a
26 franchise agreement limiting venue to a non-California forum” and expressing “a strong public
27 policy of the State of California to protect California franchisees from the expense, inconvenience,
28 and possibly prejudice of litigating in a non-California venue”). DMCG’s reliance on *Fischer v.*

1 *Zespri Fresh Prod. N. Am. Inc.*, No. 1:07-cv-00610 LJO-NEW (WMW), 2007 WL 2385074, at *9-
2 10 (E.D. Cal. Aug. 17, 2007), is unavailing because *Fischer* did not address the specific question
3 presented here, namely whether a venue provision that contravenes the public policies set forth in
4 Section 395(b)-(c) should be enforced.³

5 DMCG asserts that Section 395(b) does not apply to this case because that statute applies to
6 loans “primarily for personal, family or household use,” while the premium financing agreement
7 Abeyta signed was to obtain a bail bond for his friend, not for use by Abeyta, his family, or his
8 household. However, the California Court of Appeal recently held in *BBBB Bonding Corporation*,
9 73 Cal. App. 5th at 67-68, that a bail bond premium agreement is a “consumer credit contract”
10 because it is an “extension of credit” “secured by other than real property, or unsecured, for use
11 primarily for personal, family, or household purposes,” under Cal. Civ. Code § 1799.90, thus
12 triggering the disclosure requirements contained in Cal. Civ. Code § 1799.91. As in this case, the
13 plaintiff in *BBBB* signed a premium agreement to bail out a friend. Although *BBBB*’s holding relates
14 to Section 1799.91 and not Section 395(b), the same statutory language in both statutes should be
15 given the same construction as applied to bail premium agreements. As such, the Court finds that a
16 bail bond premium agreement is a “consumer credit contract . . . for use primarily for personal,
17 family, or household purposes,” under Section 395(b).

18 DMCG also contends that Section 395(b) does not apply because this a putative class action.
19 DMCG has not cited any authority holding that Section 395(b) does not apply to putative class
20 actions. The Court notes that the *BBBB* case is a statewide class action filed in Alameda County,
21 the location where the named plaintiff co-signed the bail bond premium agreement. *See generally*
22 Dkt. No. 22-2 at 13-16 (appellate brief filed by *BBBB* describing case).⁴

23
24 ³ In *Fischer*, the plaintiffs were kiwifruit growers who sued a kiwifruit distributor, and the
25 distributor moved to enforce a contractual venue provision specifying Los Angeles courts for any
26 litigation. The plaintiffs opposed transfer on the ground that the venue provision was void for failing
27 to comply with the general venue statute, Section 395. It is not apparent from the *Fischer* decision
28 whether the plaintiffs specifically argued that the venue provision was unenforceable under federal
law because it was contrary to California public policy, and in any event, the contract at issue in
Fischer would not appear to be a “consumer credit contract” falling under Section 395(b).

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28 ⁴ The Court GRANTS Abeyta’s request for judicial notice of the pleadings and trial court
order in *BBBB*.

1 Accordingly, the Court concludes that the Promissory Note's venue selection clause is void
2 and unenforceable.

3

4 **II. Discretionary Transfer of Venue**

5 The Court now considers DMCG's motion to transfer venue to the Central District of
6 California under 28 U.S.C. § 1404(a). To support a motion to transfer, DMCG must establish: (1)
7 that venue is proper in the transferor district; (2) that the transferee district is one where the action
8 might have been brought; and (3) that the transfer will serve the convenience of the parties and
9 witnesses, and will promote the interests of justice. *See Goodyear Tire & Rubber Co. v. McDonnell*
10 *Douglas Corp.*, 820 F.Supp. 503, 506 (C.D. Cal. 1992). The parties do not dispute the first and
11 second prongs,⁵ and dispute whether transfer will be convenient and promote the interests of justice.

12 In the Ninth Circuit, district courts have "discretion to adjudicate motions for transfer
13 according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Jones v.*
14 *GNC Franchising Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (quoting *Stewart Org. v. Ricoh Corp.*, 487
15 U.S. 22, 29 (1988)). In making the determination, a court may consider: (1) where the relevant
16 agreements were negotiated and executed; (2) the state most familiar with the governing law; (3)
17 plaintiff's choice of forum; (4) the respective parties' contacts with the forum; (5) contacts relating
18 to plaintiff's cause of action in the chosen forum; (6) differences in litigation costs in the two forums;
19 (7) ability to compel attendance of unwilling non-party witnesses; (8) ease of access to sources of
20 proof; (9) presence of a forum selection clause; and (10) relevant public policy of the forum state,
21 if any. *Id.* at 498-99. The moving party bears the burden of showing a transfer is "more"
22 appropriate. *Id.*

23 The parties agree that the second and seventh factors are neutral. As discussed above, the
24 Court has found that the venue clause is unenforceable due to California public policy, and thus the
25 ninth and tenth factors do not weigh in favor of transfer. The remaining factors, discussed below,
26 are either neutral or do not support transfer.

27

28 ⁵ Abetya states that if this case had originally been filed in federal court, it could have been
filed in the Central District because DMCG is headquartered there. *See* 28 28 U.S.C. § 1391(b)(1).

1 The first factor supports venue in this District because Abeyta executed the agreements in
2 Alameda County, within the Northern District.

3 On the third factor, while a plaintiff's choice of forum generally receives deference in a
4 motion to transfer venue, in the class action context a plaintiff's choice is given less weight. *Lou v.*
5 *Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) ("[W]hen an individual . . . represents a class, the named
6 plaintiff's choice of forum is given less weight."). Nonetheless, even in a class action, a plaintiff
7 may still be entitled to some deference. *See Shultz v. Hyatt Vacation Mktg. Corp.*, No. 10-CV-
8 04568-LHK, 2011 WL 768735, at *3 (N.D. Cal. Feb. 28, 2011). Specifically, courts must consider
9 "the extent of both [plaintiff's] and the [defendant's] contacts with the forum, including those
10 relating to [plaintiff's] cause of action." *Lou*, 834 F.2d at 739 (citations omitted). Thus, in a
11 proposed class action, the analysis under the third factor incorporates the fourth and fifth factors.

12 Here, Abeyta is a resident of Oakland. Abeyta's causes of action arise out of his execution
13 of the credit agreements in this district and DMCG's collection attempts here in this district. DMCG
14 maintains several bail bond offices within this District and its headquarters are in Riverside. Abeyta
15 has no contacts with the Central District, but members of the proposed class may be residents of
16 that district or have significant contacts. The third through fifth factors somewhat weigh against
17 transfer.

18 On the sixth factor – differences in litigation costs between the two venues – because the
19 claims arise out of DMCG's business practices, many of the witnesses will be DMCG's employees,
20 and this factor would weigh in favor of transfer. However, Abeyta argues that many of the
21 employees he interacted with when signing the credit agreements are located here in this district.
22 Abeyta also states that he is willing to depose DMCG's Southern California witnesses in a
23 reasonable location convenient to them, such as Riverside, or remotely. Opp'n at 11. In addition,
24 transfer is not appropriate if it simply shifts the inconvenience from one party to another. *Decker*
25 *Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). As such, this factor is
26 neutral.

27 Finally, as to ease of access to sources of proof, DMCG argues that the relevant documents
28 are likely to be located in Riverside. However, Abeyta asserts that DMCG will also have to produce

1 the documents from the bail bond office located within this district, and Abeyta contends that most
2 documents produced during discovery will be delivered electronically as the events giving rise to
3 the litigation only occurred in the past two years. The Court finds that this factor is largely neutral
4 given that documents are likely to be located in both districts and the fact that much document
5 production is electronic.

6 Having weighed the *Jones* factors and finding most of them neutral, and keeping in mind the
7 broad discretion granted to district courts when deciding a motion to transfer venue, the Court
8 concludes that transfer to the Central District will not further the convenience of the parties or the
9 interests of justice under §1404(a).

10

11 **CONCLUSION**

12 For the foregoing reasons, the Court DENIES DMCG's motion to dismiss and alternative
13 motion for transfer of venue.

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15 **IT IS SO ORDERED.**

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17 Dated: April 12, 2023

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SUSAN ILLSTON
United States District Judge